

ORIGINAL

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

MM Docket No. 96-43

In re

Amendment of Section 73.202 (b)
Table of Allotments
FM Broadcast Stations
(Frederiksted, Virgin Islands)

)
)
) RM-8754
)
)
)

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To: The Chief, Allocations Branch

JOINT OPPOSITION TO MOTION TO DISMISS

Jose J. Arzuaga ("petitioner") and Rafael Serra, who has consented to join in the instant opposition pleading prepared by counsel for petitioner, herewith submit their JOINT OPPOSITION TO MOTION TO DISMISS in the above-captioned proceeding as follows:

1. As the Commission is aware, a counterproposal has been advanced by Rafael Serra in the above-captioned proceeding. He seeks allotment of Channel 298A at Saint John, U.S.V.I. To permit this, he proposes that Channel 296B1 be assigned to Frederiksted rather than Channel 297B1 as proposed by the Commission. Petitioner submitted reply comments in favor of this proposal.

2. Another counterproposal was advanced by Calypso Communications, permittee of WVNK (FM), Charlotte Amalie, Virgin Islands. Calypso seeks allotment of Channel 297B1 to Charlotte Amalie instead of Frederiksted and modification of its construction permit to specify operations on Channel 297B1 instead of Channel 246B.

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There would be no new allotments resulting from the Calypso proposal. The Serra proposal would result in the allotment of two new channels.

3. On the due date for reply comments in this proceeding, Calypso filed a pleading styled "REPLY COMMENTS OF CALYPSO COMMUNICATIONS AND MOTION TO DISMISS COUNTERPROPOSAL FILED BY RAFAEL SERRA." The instant pleading responds to the motion to dismiss.

4. Calypso sets forth two reasons as to why the Serra proposal should be dismissed. Essentially Calypso argues that the proposed allotment is short-spaced to the pending application site of Station WAHQ-FM, Carolina, Puerto Rico in violation of Section 73.208 of the Commission's Rules and that St. John does not qualify as a community. As will be demonstrated, both of these arguments are at best hyper-technical and certainly should not result in the dismissal of the Serra counter-proposal.

Short Spacing

5. With respect to the short-spacing argument, Calypso submits the Engineering Statement of Neil M. Smith in which he states that "WAHQ has a pending application which specifies a new site ... 112 kilometers from the proposed Saint John site, creating a one-kilometer short-spacing." In the spacing table submitted with Serra's counterproposal, he lists the WAHQ application and indicates that the distance from his proposed reference point is "112 km; 70 mi.; Clear." There is no argument regarding the fact that the separation is 112 km. However, Serra has also computed the distance in miles and has computed the distance at 70 miles. Section 73.207 of the Commission's Rules lists the separation requirement for Class A to Class B stations both in kilometers

and miles. The rule specifies a separation of 113 km and 70 miles. Serra saw that the separation was 70 miles and believed that the specified coordinates were clear.

7. Mr. Arzuaga, a Consulting Radio and T.V. Engineer, has calculated the actual distance between the reference points indicated in the Serra proposal. The distance calculates to 112.28 km or 69.77 miles. This rounds to 112 km or 70 miles, thus creating the anomaly of this case that the separation is sufficient in terms of miles but appears short-spaced when kilometers are applied. To see how this anomaly occurs, the Commission's attention is directed to the fact that the rules originally were calculated in miles. 70 miles is 112.65 km. This rounds off to 113. However, if one takes the actual separation here (112.28 km.) and subtracts that from 112.65 km.(70 mi.), the short-spacing expressed in kilometers is .37 km., which rounds off to zero. Accordingly, the alleged short-spacing here is at best technical since it results only due to the use of rounding in computing the 113 km. requirement.

8. It is also noted that the allocations involved here are both on islands which are separated by ocean. Any interference which might occur would be in the ocean and of no real significance to listeners, adding yet another layer of technicality to the alleged short-spacing. Finally, as noted by Calypso, the Note to Section 73.208(a) permits the filing of an amendment to a counterproposal where the party "could not have known by exercising due diligence of the pendency of the conflicting FM application." Here, of course, Serra knew that the WAHQ application was pending but did not know that it was "conflicting." In fact, Serra reported that it was not conflicting, believing that the 70 mi. separation was adequate. Under these circumstances, the Commission should permit Serra to amend his

counterproposal in keeping with the spirit of the rules. To do otherwise would be to exalt form over substance.

9. Mr. Arzuaga has determined that the proposed reference site for the Serra proposal can be changed from 18 20 30 by 64 43 59 to 18 20 30 by 64 47 51. This change of 08 seconds of longitude would remove all questions pertaining to short-spacing since the site would meet the 113 km. requirement (see attached Engineering Statement of Jose J. Arzuaga). Serra represents that he will so amend his proposal if permitted to do so by the Commission.

10. It is noted that even if the Commission were to apply its rules in an extremely harsh and hyper-technical manner (as advocated by Calypso for the obvious reason that it cannot prevail on the merits here), the analysis of this proceeding should not be affected by the Commission's action. A grant of the Calypso proposal would preclude a future amendment of the Table of Allotments to permit allocation of a new station in both St. John and Frederiksted. A grant of the Arzuaga proposal would permit the eventual allotment of stations in both communities. The Commission should take these facts into consideration regardless of what it decides to do with the technical issues raised by Calypso in this proceeding.

St. John Qualified as a Community

11. The other argument made by Calypso in support of dismissal of the Serra proposal is the fact that St. John does not qualify as a community. Calypso states, at para. 4 of its pleading: "In FM Channel Policies/Procedures, supra, 90 FCC 2d at 101, the Commission held that when identifying "communities" for allotment purposes, "It is sufficient that the community is incorporated or is listed in the census." Attached to the

Calypso pleading is a copy of the 1990 U.S. Census table listing St. John Island. Since St. John is listed, the very authority cited by Calypso demonstrates the eligibility of St. John as a community.

12. Calypso goes on to argue, with tortured logic, that “the Commission can no more designate the entire island of St. John as an allotment ‘community’ under FM Policies/Procedures, supra, than it could designate ‘Long Island’ or ‘New York State.’” Of course, it is interesting that Calypso picked New York as an example due to the unique character of community designations in that State. Much of New York is divided into Villages and Towns or Townships with the “smallest” distinct group being the Village. Nevertheless, the Commission recognizes Towns or Townships as communities for allocation purposes. There is no requirement that the “smallest” distinct group be chosen. Calypso’s analogy of designating Long Island or New York State as a community is absurd and not at all the case in point. The correct analogy is the island of Vieques and the island of Culebra in Puerto Rico. Each of these islands have smaller distinct communities within their borders. Nevertheless, the Commission has assigned frequencies to both of these islands (see attached Engineering Statement). In the case of Vieques, this island is in fact larger than St. John. Clearly, if Vieques and Culebra are eligible as communities, St. John is likewise eligible.

13. Calypso has also misstated the facts relating to the Island of St. John. Petitioner has researched the matters raised in para. 5 of Calypso’s pleadings. Contrary to the assertions contained therein, the main office and some facilities of the Community Health Center are located at Susanberg with emergency room at Cruz Bay. New facilities are planned for Coral Bay. The fire department at Cruz Bay is one of two. The other is in

Coral Bay. Each covers their half of the island. Contrary to Calypso's statements, the Coast Guard representative at the St. Thomas station, William McCarson, stated that there is no Coast Guard installation in St. John. FBI employee Ricardo Martinez at St. Thomas stated that there is no FBI office in Cruz Bay or on St. John. Ms. Todman, supervising the Dept. of Education on St. Thomas informs that there are two public schools on St. John, one is at Coral Bay, the other at Cruz Bay.

14. Calypso also attempts to create significance in the fact that Cruz Bay is the only Census Designated Place (CDP) on St. John (pleading at para. 5). However, if one examines the table presented by Calypso, it is seen that on St. Croix, Frederiksted is listed as a CDP whereas Christiansted is not. The fact is that it is "Christiansted town" and "Frederiksted town" (as listed in the same Census Table) which have been allocated frequencies by the FCC - not the CDP. The attached Engineering Statement includes a table from the 1990 Census which lists the towns located in the Virgin Islands (last three listings on the table). They are Charlotte Amalie, Christiansted, and Frederiksted. These are the communities which have been identified for allocation purposes by the FCC on St. Croix and St. Thomas. Cruz Bay is not a town in the Virgin Islands. Therefore, Cruz Bay is entitled to no greater weight as a community than the island of St. John itself.

15. In summary, there are a number of small communities on St. John apart from Cruz Bay which are without service, including Coral Bay. It appears that even if the Commission ruled that St. John were "too large" an entity to be a community (contrary to the Vieques precedent), Coral Bay would qualify. Therefore, the proposal could be amended to specify a first service for Coral Bay. However, Serra chose St. John as the larger community so that the entire island could be served in the same manner that Culebra

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15. In summary, there are a number of small communities on St. John apart from Cruz Bay which are without service, including Coral Bay. It appears that even if the Commission ruled that St. John were "too large" an entity to be a community (contrary to the Vieques precedent), Coral Bay would qualify.ⁱ Therefore, the proposal could be amended to specify a first service for Coral Bay. However, Serra chose St. John as the larger community so that the entire island could be served in the same manner that Culebra

and Vieques are served in Puerto Rico. There simply is no basis for distinguishing those two islands from St. John. Moreover, St. John is the only U.S. island in the Caribbean “hurricane alley” that has no airport and is only accessible by boat or emergency helicopter. Assignment of Channel 298A to St. John would give this island its first local radio service which would be of great benefit to the various small communities scattered around the island. To apply Calypso’s rationale that St. John does not qualify as a community because Long Island or New York State do not qualify is absurd.

Other Matters

16. Calypso attempts to bolster its arguments by appealing to “fairness” since it claims that its channel is unusable (despite the fact that there is no operating station in conflict with Calypso). The Commission should not be swayed by this emotional appeal. From August 9, 1991 until June 2, 1995, Channels 275A (can be upgraded to B1) and 226A were available and no move on the part of Calypso was made to request these (see attached Engineering Statement listing the 13 existing broadcast stations and 2 new allocations in Charlotte Amalie - perhaps, the most over-served broadcast market in the world). In contrast, no alternate channel is available to St. John. Finally, there simply is no adequate basis for honoring Calypso’s request to change channels without making the channel available to competitors. Should the Commission allocate Channel 297B1 to Charlotte Amalie, other parties should be given an opportunity to apply. Serra hereby affirms that if such an allocation were made, he would file an application for the new frequency.

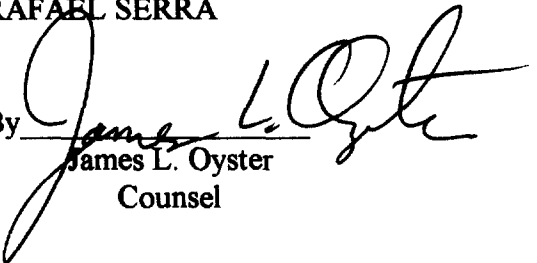
WHEREFORE, THE PREMISES CONSIDERED, it is respectfully requested that the Commission deny Calypso’s motion to dismiss the Serra counterproposal.

Respectfully submitted,

Law Offices
JAMES L. OYSTER
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June 3, 1996

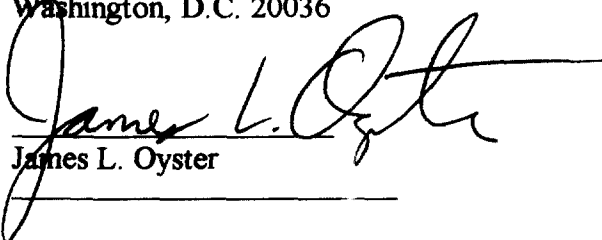
JOSE J. ARZUAGA
RAFAEL SERRA

By 
James L. Oyster
Counsel

CERTIFICATE OF SERVICE

James L. Oyster hereby certifies that he has sent a copy of the foregoing by first class U.S. mail, postage prepaid, or by hand delivery, on or before the 3rd day of June, 1996, to the following:

Jerold L. Jacobs, Esq.
Rosenman & Colin, L.L.P.
1300 19th Street, N.W.
Suite 200
Washington, D.C. 20036


James L. Oyster

ⁱ If, as Calypso contends, Cruz Bay is the only "community" on St. John for allocation purposes, the Serra proposal should be permitted to go forward as a "Cruz Bay" proposal. This would not be a "change" in proposed community but a determination that the qualified "community" within the area proposed to be served by Serra is Cruz Bay and that the proposal must be advanced in keeping with that determination. Again, Calypso's argument that dismissal is the only permissible result places form over substance. Serra reiterates his intention to apply if the Commission allocates the proposed channel to Cruz Bay rather than St. John.

ENGINEERING STATEMENT

Attached are Exhibits and Tables in support of the foregoing pleading and the supporting declaration of Jose J. Arzuaga. They are presented as follows:

St. John Allocation Study

Stations Licensed to Islands of Culebra and Vieques

Charlotte Amalie Stations

1990 Census Table for Virgin Islands

Declaration

ST. JOHN
ALLOCATION STUDY

NEW REFERENCE POINT: 18-20-30 64-43-51 298A (107.5 MHZ.)

WAHQ	18-18-36	65-47-41	112.52KM 69.92MI
WAHQ - EL YUNQUE	18-24-10	66-03-01	139.61KM 86.75MI
WCMN	18-14-52	66-48-43	220.29KM 136.88MI
WMEG	18-06-48	66-03-07	142.00KM 88.24MI
FREDERIKSTED	17-43-15	64-45-00	68.74KM 42.71MI

STATIONS LICENSED TO ISLANDS OF CULEBRA AND VIEQUES

CALL	CHANNEL	COMMUNITY
WXZX	293A	CULEBRA
WSAN	255B	VIEQUES
WIVV	1370 KHZ	VIEQUES

CHARLOTTE AMALIE STATIONS

AM'S

WIBS - AM	1190 KHZ.
WSTA - AM	1340 KHZ.
WVWI - AM	1000 KHZ.

TV

WAIG - TV	CH.43
WBND - TV	CH.10
WTJX - TV	CH.12
WVGI - TV	CH.17

FM'S

WIV1 - FM	241B1
WVMX - FM	246B
WGOD - FM	250B
WTBN - FM	271B
WIYC - FM	282B
WVGN - FM	287B

NEW ALLOC GRANTED	6/02/95	275A	FILING WINDOW	7/28/95 - 8/28/95
NEW ALLOC GRANTED	6/02/95	226A	FILING WINDOW	7/28/95 - 8/28/95

**VIRGIN ISLANDS
OF THE UNITED STATES**

**Bureau of the Census
Department of Commerce**

*** 1990 Population Totals ***

This table provides first 1990 census population counts for the Virgin Islands of the United States, its Virgin Islands, subdistricts, and towns.	
Geographical Unit	Number of Persons
Virgin Islands	101,889
St. Croix Island	50,377
Anna's Hope Village subdistrict	3,643
Christiansted subdistrict	1,372
East End subdistrict	1,740
Fredriksted subdistrict	4,046
Northcentral subdistrict	3,495
Northwest subdistrict	4,820
Ston Farm subdistrict	11,205
Southcentral subdistrict	7,425
Southern subdistricts	7,040
St. John Island	1,904
Central subdistrict	621
Coast Bay subdistrict	343
Cruz Bay subdistrict	2,449
East End subdistrict	31
St. Thomas Island	48,166
Charlotte Amalie subdistrict	20,589
East End subdistrict	5,927
Northside subdistrict	6,404
Southside subdistrict	4,648
Tutu subdistrict	9,084
Water Island subdistrict	172
West End subdistrict	1,322
Charlotte Amalie town	12,331
Christiansted town	2,555
Fredriksted town	1,066

I, JOSE J. ARZUAGA, certify that I am a Consulting Radio and T.V. Engineer, that my qualifications are known to the Federal Communications Commission and I prepared this statement.

I further state that the calculations and exhibits contained herein were prepared by me personally or under my direction and that all facts contained therein are true to my knowledge except where stated to be on information or belief, and as to those facts, I believe them to be true.



José J. Arzuaga

Date: MAY 29 1996